

Atty Gen. Op. No. 11 - JIB14

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August 30, 2011

Mr. Randall Chase  
The Associated Press  
P.O. Box 934  
Dover, DE 19903

**RE: Freedom of Information Act Appeal Concerning  
Department of Correction**

Dear Mr. Chase:

On July 22, 2011, you requested a ruling from the Chief Deputy Attorney General as to whether the Delaware Department of Correction ("DOC") violated the Freedom of Information Act, 29 *Del. C.* ch. 100 ("FOIA"), in denying your July 7, 2011 request for "all records, including but not limited to purchase orders, invoices, billing records, shipping records, inventory records and emails, related to any and all purchases, receipts and/or transfers of pentobarbital and sodium thiopental by and/or on behalf of the Delaware DOC since Jan. 1, 2010." I have reviewed your request and arguments in support thereof as well as the denial by DOC and its state reasons. I conclude the DOC has erred under FOIA for the following reasons.

First, the DOC pointed out that it is "currently facing multiple legal challenges to the manner in which it is to carry out executions." 29 *Del. C.* § 10002(g)(9) (exception for records relating to pending or potential litigation). I can fairly presume these legal challenges surrounded the execution of Robert Jackson, which took place on July 29, 2011. In light of Mr. Jackson's execution, the "pending litigation" exception would seem to be mooted, at least for the

moment. It is also a safe assumption, however, that there will be further litigation in the future, preceding the next execution. The difficulty with the position of DOC then, is not only that it is mooted by Jackson's execution, but also that all future executions are in some state of litigation, virtually from the date of a judge's determination of the sentence of death. The information concerning the supplier of lethal chemicals in an execution do not appear to me to be "records pertaining to pending or potential litigation," but rather are more akin to records pertaining to a sentence to be carried out pursuant to litigation that will have, by that time, be over. For both of these reasons, this position advanced by DOC is not persuasive.

Second, the DOC maintains that it has an obligation pursuant to 11 *Del. C.* § 4209(f) to carry out executions and that this request "in this context" is "directly in conflict" with its statutory mandate. It therefore urges that these records are "specifically exempted from disclosure by statute or common law." 29 *Del. C.* § 10002(g)(6). The difficulty with this argument is that nothing in 11 *Del. C.* § 4209 (the death penalty provisions) contains any explicit exemption from FOIA. DOC is thus asking us to "read in" an exemption from FOIA that the death penalty statute does not contain. This is inconsistent with the policy of FOIA, which is that information be made available unless an exception applies. We are not inclined to find an exception from FOIA in the death penalty statute absent a specific directive from the General Assembly.

Third, the DOC asserted the company from which it obtained the chemicals has "asserted a commercial need for confidentiality." There is indeed an exemption under FOIA for "trade secrets and commercial or financial information obtained from a person which is of a privileged or confidential nature." 29 *Del. C.* § 10002(g)(2). Were this need for confidentiality further developed and articulated, it may well be dispositive. When DOC was invited to develop its

position further with respect to this issue, however, it said only that the Commissioner of Corrections was of the view that the vendor was located only with some difficulty, that it did not want to be involved in the execution process at all, and that it was concerned generally that it might suffer a loss of reputation or a loss of business. This does not strike us as a "need" so much as a "want." On the other hand, the statute permits the exemption to apply whenever the information is "of a privileged or confidential nature," terms that are not further defined or explained. While the Commissioner's difficulties are certainly not insubstantial, the identity of a vendor who does business with the state but seeks to do so namelessly strikes us as problematic under FOIA. We do not believe the agency has overcome FOIA's presumption favoring disclosure and its burden of proof on the agency seeking to avoid disclosure. While the record is not further developed, it is at least noteworthy that Mr. Chase has argued that he himself was given the identity of the lethal chemical supplier pursuant to a 2006 FOIA request. We do not know the details of that request or its response, but it does seem that the same general arguments about "privileged or confidential" business information would have held equal sway five years ago.

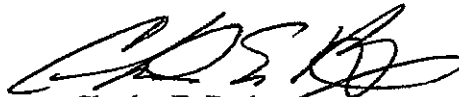
Fourth and finally, DOC has posited that it is exempt from disclosing the vendor of the lethal chemicals pursuant to a court order protecting the identities of the individuals who are members of the lethal injection team. That order was issued in a suit by a prisoner challenging his death sentence. Order, June 8, 2007, *Jackson v. Danberg, et al.*, C.A.No. 060-300-SLR (D.Del.). The order was filed in response to Jackson's discovery request for the State to identify the lethal injection team. The State sought and received a protective order prohibiting the plaintiff from revealing "the identities of the members of the lethal injection team or of the physician who pronounced the death of the condemned," which he would learn as a result of

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discovery. No discovery was sought as to the vendor of the lethal drugs, the State did not include the vendor in its proposed order, and the court's order does not extend to the vendor. Had the Order extended that far, the identity of the vendor would clearly be exempt under FOIA. It did not. Therefore the court order cannot serve as an exemption.

For the reasons stated here, I find that the DOC must provide the documents you requested.

Very truly yours,

A handwritten signature in black ink, appearing to read 'C. Butler', is written over the typed name.

Charles E. Butler  
Chief Deputy Attorney General

cc: Carl C. Danberg, Commissioner, Delaware Department of Correction  
Aaron Goldstein, Deputy Attorney General